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19 **UNITED STATES DISTRICT COURT**  
20 **SOUTHERN DISTRICT OF CALIFORNIA**

21 **GREGORY MONTEGNA;  
22 INDIVIDUALLY AND ON  
23 BEHALF OF ALL OTHERS  
24 SIMILARLY SITUATED,**

25 Plaintiff,

26 v.

27 **SWIFT FUNDS FINANCIAL  
28 SERVICES,**

29 Defendant.

30 **Case No.: '13CV0372 WQHBLM**  
31 **CLASS ACTION COMPLAINT**  
32 **FOR DAMAGES**

33 **JURY TRIAL DEMANDED**

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## INTRODUCTION

1. GREGORY MONTEGNA (“Plaintiff”); brings this class action for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of SWIFT FUNDS FINANCIAL SERVICES and its related entities, subsidiaries and agents (“Defendant”) in willfully employing and/or causing to be employed certain recording equipment in order to record to the telephone conversations of Plaintiff without the knowledge or consent of Plaintiff, in violation of California Penal Code §§ 630 *et seq.*, thereby invading Plaintiff’s privacy. Plaintiff alleges as follows upon personal knowledge as to their own acts and experiences, and, as to all other matters, upon information and belief, including the investigation conducted by his attorneys.
2. California Penal Code § 632 prohibits one party to a telephone call from intentionally recording the conversation without the knowledge or consent of the other. Penal Code § 632 is violated the moment the recording is made without the consent of all parties thereto, regardless of whether it is subsequently disclosed. The only intent required by Penal Code § 632 is that the act of recording itself be done intentionally. There is no requisite intent on behalf of the party doing the surreptitious recording to break California or any other law, or to invade the privacy right of any other person. Plaintiff alleges that despite California’s two-party consent rule, Defendant continues to violate Penal Code § 632 by impermissibly recording its telephone conversations with California residents.

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## **JURISDICTION AND VENUE**

3. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff seeks relief on behalf of a national class, which will result in at least one class member belonging to a different state than that of Defendant. Plaintiff also seeks the greater of statutory damages of \$5,000 per violation or three times actual damages per violation pursuant to Penal Code § 637.2(a), which, when aggregated among a proposed class number in the tens of thousands, exceeds the \$5,000,000 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.
4. Venue is proper in the United States District Court for the Southern District of California pursuant to 18 U.S.C. § 1391(b) because Defendant does business within the State of California and the County of San Diego.

## PARTIES

5. Plaintiff is, and at all times mentioned herein was, an individual citizen and resident of the County of San Diego, State of California.
6. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times mentioned herein was, a corporation whose principal place of business and State of incorporation is California. Defendant has a policy and practice of recording telephone conversations with the public, including California residents. Defendant's employees and agents are directed, trained and instructed to, and do, record, the telephone conversations with the public, including California residents.

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## **FACTUAL ALLEGATIONS**

7. Defendant is, and at all times mentioned herein was, a professional corporation. Plaintiff is informed and believe, and on the basis of that information and belief allege, that at all times mentioned in this Complaint, Defendants were the agents and employees of their co-defendants, and in doing the things alleged in this Complaint, were acting within the course and scope of that agency and employment.
8. At all times relevant, Plaintiff was an individual residing within the County of San Diego, State of California.
9. Since January 2013, Plaintiff had numerous telephone communications with certain employees, officers and/or agents of Defendant.
10. Specifically on January 23, 2013, Defendant contacted Plaintiff by telephone in order discuss one of Plaintiff's clients. After speaking with Defendant for a period of time, including discussions protected by the attorney-client privilege, Plaintiff inquired as to whether the conversation was being recorded and Defendant responded for the first time that Defendant records all calls between Defendant and consumers.
11. During each of these conversations with Defendant, Plaintiff discussed highly confidential and private financial information that Plaintiff had not openly discussed with others.
12. Plaintiff had no reasonable expectation that any of Plaintiff's telephone conversations with Defendant would be recorded due to the private subject matter being discussed.
13. Plaintiff was shocked to discover that such a confidential communication was being recorded by Defendant without Plaintiff's knowledge or consent.
14. Plaintiff found Defendant's clandestine recording to be highly offensive due to the delicacy of the topics discussed during said conversations.

1 15. Each of these conversations with Plaintiff, were without Plaintiff's  
2 knowledge or consent, recorded by Defendant, causing harm and damage to  
3 Plaintiff. Prior to Plaintiff's query on the matter, Plaintiff was never  
4 informed that Plaintiff's telephone calls were being recorded. At no time  
5 during these calls did Plaintiff give consent for the telephone calls to be  
6 recorded.

7 16. Plaintiff is informed and believes, and thereon alleges, that during the  
8 relevant time period, Defendant has had a policy and a practice of recording  
9 telephone conversations with consumers. Defendant's employees and agents  
10 are directed, trained and instructed to, and do, record, monitor, and/or  
11 eavesdrop upon telephone conversations with the public, including Plaintiff  
12 and other California residents.

13 17. Plaintiff is informed and believes, and thereon alleges that from the  
14 beginning of 2012 to the present, Defendant has installed and/or caused to be  
15 installed certain wire-tapping, eavesdropping, and listening equipment in its  
16 employees' or agents' telephone lines. Defendant uses these devices to  
17 record each and every telephone conversation on said telephone lines.

18 18. Plaintiff is informed and believes, and thereon alleges, that during the  
19 relevant time period, Defendant has had all of its calls to the public,  
20 including those made to California residents, recorded without the  
21 knowledge or consent of the public, including Plaintiff and other California  
22 residents.

23 19. Defendant's conduct alleged herein constitutes violations of the right to  
24 privacy to the public, including Plaintiff and other California residents, and  
25 California Penal Code § 630 *et seq.*

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## **CLASS ACTION ALLEGATIONS**

20. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated (“The Class”).
21. Plaintiff represents, and is a member of, “The Class” defined as follows: “All persons in California whose outbound telephone conversations were recorded without their consent by Defendant within one year prior to the filing of the original Complaint in this action.”
22. Defendant, and its employees and agents are excluded from The Class. Plaintiff does not know the number of members in The Class, but believe this number to be in the tens of thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.
23. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf of The Class and it expressly is not intended to request any recovery for personal injury and claims related thereto. Plaintiff reserves the right to expand The Class definition to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation and discovery.
24. The joinder of The Class members is impractical and the disposition of their claims in the Class action will provide substantial benefits both to the parties and to the Court. The Class can be identified through Defendant’s records.
25. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact to The Class predominate over questions which may affect individual Class members, including the following:
  - a. Whether Defendant has a policy of recording outgoing calls;
  - b. Whether Defendant discloses to callers and/or obtains their consent that their outgoing telephone conversations were being recorded;

- c. Whether Defendant's policy of recording outgoing calls constituted a violation of California Penal Code §§ 632(a); and, 637.
- d. Whether Plaintiff and The Class were damaged thereby, and the extent of damages for such violations; and
- e. Whether Defendants should be enjoined from engaging in such conduct in the future.

26. Plaintiff is asserting claims that are typical of The Class because every other member of The Class, like Plaintiff, was exposed to virtually identical conduct and are entitled to the greater of statutory damages of \$5,000 per violation or three times actual damages per violation pursuant to Penal Code § 637.2(a).

27. Plaintiff will fairly and adequately represent and protect the interests of The Class in that Plaintiff has no interest antagonistic to any member of The Class. Plaintiff has retained counsel experienced in handling class action claims to further ensure such protection.

28. Plaintiff and the members of The Class have all suffered irreparable harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class action, The Class will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy and Defendant will likely continue such illegal conduct. Because of the size of the individual Class member's claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein.

29. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendant to comply with federal and California law. The interest of The Class members in individually controlling the prosecution of separate claims against Defendant is small because the maximum statutory damages in an individual action for violation of privacy are minimal. Management of these claims is

1 likely to present significantly fewer difficulties than those presented in many  
2 class claims.

3 30. Defendant has acted on grounds generally applicable to The Class, thereby  
4 making appropriate final injunctive relief and corresponding declaratory  
5 relief with respect to The Class as a whole.

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7 **FIRST CAUSE OF ACTION**

8 **INVASION OF PRIVACY: VIOLATION OF PENAL CODE § 632**

9 31. Plaintiff incorporates by reference all of the above paragraphs of this  
10 Complaint as though fully stated herein.

11 32. Californians have a constitutional right to privacy. Moreover, the California  
12 Supreme Court has definitively linked the constitutionally protected right to  
13 privacy within the purpose, intent and specific protections of the Privacy  
14 Act, including specifically, Penal Code § 632. “In addition, California’s  
15 explicit constitutional privacy provision (Cal. Const., 1 § 1) was enacted in  
16 part specifically to protect California from overly intrusive business  
17 practices that were seen to pose a significant and increasing threat to  
18 personal privacy. (Citations omitted). Thus, Plaintiff believes that California  
19 must be viewed as having a strong and continuing interest in the full and  
20 vigorous application of the provisions of section 632 prohibiting the  
21 recording of telephone conversations without the knowledge or consent of  
22 all parties to the conversation.

23 33. California Penal Code § 632 prohibits one party to a telephone call from  
24 intentionally recording the conversation without the knowledge or consent of  
25 the other party. Penal Code § 632 is violated the moment the recording is  
26 made without the consent of all parties thereto, regardless of whether it is  
27 subsequently disclosed that the telephone call was recorded. The only intent  
28 required by Penal Code § 632 is that the act of recording itself be done

1       intentionally. There is no requisite intent on behalf of the party doing the  
2 surreptitious recording to break California law or any other law, or to invade  
3 the privacy right of any other person.

4       34. Plaintiff is informed and believes, and thereupon alleges, that Defendant  
5 employed and/or caused to be employed certain recording equipment on the  
6 telephone lines of all employees, officers, directors, and managers of  
7 Defendant.

8       35. Plaintiff is informed and believes, and thereupon alleges, that all these  
9 devises were maintained and utilized to record each and every outgoing  
10 telephone conversation over said telephone lines.

11       36. Said recording equipment was used to record the telephone conversations of  
12 Plaintiff and the members of The Class, all in violation of California Penal  
13 Code § 632.6(a).

14       37. At no time during which these telephone conversations were taking place  
15 between Defendant or any employee, agent, manager, officer, or director of  
16 Defendant, and any other person, did Defendant inform Plaintiff or any other  
17 member of The Class that the recording of their telephone conversations  
18 were taking place and at no time did Plaintiff or any other member of The  
19 Class consent to this activity.

20       38. Defendant, knowing that this conduct was unlawful and a violation of  
21 Plaintiff and the members of The Class' right to privacy and a violation of  
22 California Penal Code § 630, *et seq.*, did intrude on Plaintiff and the  
23 members of The Class' privacy by knowingly and/or negligently and/or  
24 intentionally engaging in the aforementioned recording activities relative to  
25 the telephone conversations between Plaintiff and The Class members, on  
26 the one hand, and Defendant on the other hand, as alleged herein above.

1 39. Based on the foregoing, Plaintiff and the members of The Class are entitled  
2 to, and below herein do pray for, their statutory remedies and damages,  
3 including but not limited to, those set forth in California Penal Code § 637.2.  
4 40. Because this case is brought for the purposes of enforcing important rights  
5 affecting the public interest, Plaintiff and The Class seek recovery of their  
6 attorney's fees pursuant to the private attorney general doctrine codified in  
7 Code of Civil Procedure § 1021.5, or any other statutory basis.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and The  
10 Class members the following relief against Defendant:

11 1. That this action be certified as a class action on behalf of The Class  
12 and Plaintiff be appointed as the representative of The Class;

13 2. For the greater of statutory damages of \$5,000 per violation or three  
14 times actual damage per violation pursuant to Penal Code § 637.2(a) for  
15 Plaintiff and each member of The Class;

16 3. Injunctive relief in the form of an order requiring Defendant to  
17 disgorge all ill-gotten gains and awarding Plaintiff and The Class full restitution  
18 of all monies wrongfully acquired by Defendant by means of such unfair and  
19 unlawful conduct;

20 4. That the Court preliminarily and permanently enjoin Defendant from  
21 recording each and every oncoming and outgoing telephone conversation with  
22 California resident, including Plaintiff and The Class, without their prior  
23 consent, as required by California Penal Code § 630, *et seq.*, and to maintain the  
24 confidentiality of the information of Plaintiff and The Class;

25 5. For exemplary or punitive damages;

26 6. For costs of suit;

27 7. For prejudgment interest at the legal rate; and

28 8. For such further relief as this Court deems necessary, just, and proper.

## TRIAL BY JURY

Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Date: February 7, 2013

## **KAZEROUNI LAW GROUP, APC**

By: /s Abbas Kazerounian  
ABBAS KAZEROUNIAN, ESQ.  
ATTORNEY FOR PLAINTIFF

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## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.